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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 320.

NATHAN GREENBERG,
Petitioner,

against

PANAMA TRANSPORT COMPANY and
ESSO TANKERS, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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TABLE OF CONTENTS

	PAGE
STATEMENT	1
QUESTIONS PRESENTED	3
COUNTER STATEMENT OF THE FACTS	4
REASONS FOR DENYING THE WRIT	7
POINT I—The Court below correctly held, in accordance with the decisions of this Court, that petitioner had failed to establish the necessary juridictional amount to maintain federal jurisdiction. *McAlister* v. *United States*, 348 U. S. 19 has no application to the conclusion of law found by the Court below that the amount in controversy was insufficient to maintain federal jurisdiction	9
POINT II—Petitioner fails to show any conflict of opinions between the Courts of Appeals for the First and Fourth Circuits	15
POINT III—Petitioner's cause of action was based on a tort committed ashore within the State of Maine with respect to a contract made in the State of Maine and governed by state law. The cause of action does not fall within the admiralty and maritime jurisdiction of the Federal Court	17
CONCLUSION	19

Table of Cases.

	PAGE
Bennett v. *Sinclair Navigation Co.*, 33 F. Supp. 14 (D. C. E. D. Pa.)	17
Brown v. *Bodak*, 188 F. Supp. 532 (S. D. N. Y. 1960)	14
Chicago, Rock Island & Pacific Railway Company v. *Stiles*, 246 U. S. 631	17
Clinton v. *West Coast Local No. 90, etc.* 161 F. Supp. 177 (D. C. ND CAL 1955)	17
Crain v. *American Waterways Corporation*, 143, F. Supp. 256, (DC ED Pa. 1956)	18
Forgione v. *United States*, 202 F. 2d 249 (CA 3rd 1953) cert. den. 345 U. S. 966	18
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175	8
Great Lakes Transit Corporation v. *Marceau*, 154 F. 2d 623 (C. A. 2d 1946)	18
Houston Oil Co. v. *Goodrich*, 245 U. S. 440	8
KVOS v. *Associated Press*, 299 U. S. 269	14
Matthiesen v. *North Western Mutual Insurance Co.*, 286 F. 2d 775, (C. A. 5th 1961)	16
McAllister v. *United States*, 348 U. S. 19	9, 14
McDonald v. *Patton*, 240 F. 2d 424 (CA 4th 1957)	3, 15, 16
McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178	13, 14
Morris v. *Gilmer*, 129 U. S. 315	13
Robinson v. *Anderson*, 121 U. S. 522	13
Rogers v. *Missouri Pacific R. R. Co.*, 352 U. S. 500	7
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508	8
St. Paul Indemnity Co. v. *Red Cab Company*, 303 U. S. 283	9, 16
United States v. *Johnston*, 268 U. S. 220	8
Williams v. *Nottawa*, 104 U. S. 209	13

Statutes.

Federal Employer Liability Act—46 USC 51	17
Jones Act, 46 USC 688	17
Judicial Code, 28 USC 1333	18

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STATEMENT.

Petitioner, a Boston lawyer, applies for a Writ of Certiorari on the ground that the Court of Appeals for the First Circuit erroneously reversed a judgment in his favor because of lack of jurisdictional amount. Petitioner's suit was based on diversity of citizenship and asked damages in the sum of $15,000. Petitioner charged that he suffered monetary losses by reason of respondents' alleged malicious interference with a contractual relationship between him and one, Jose Vazquez, a seaman. The contract was a retainer under which petitioner was to receive one third of any sums recovered in behalf of Vazquez in his claim for damages for personal injuries.

In the trial court, respondents maintained that the contract was unenforceable because, among other things, it was champertous under the law of the State of Maine and that Vazquez had been induced to sign it on mis-representations made by petitioner's agents. Respondents maintained also that there had not been any interference, malicious or otherwise, with the contract and that any dealings respondents had with Vazquez, after he had retained petitioner, related solely to their obligation to provide Vazquez with medical care and attention, and were in the performance of other duties required under the Spanish contract between Vazquez and Panama. The other respondent, Esso Tankers, Inc., hereafter called "Esso" acted as agent for Panama, which is a Panamanian corporation.

The Court of Appeals, in dealing with the respondents' defenses above mentioned, said: "The appeal suggests a number of interesting questions but we do not reach them for lack of jurisdiction" (Pet.'s App. p. 25).

In his petition for a Writ, petitioner asserts that there was some testimony which would support a finding that there was sufficient amount in controversy to maintain federal jursidiction in this diversity suit. However, on his own testimony petitioner conceded lack of the necessary jurisdictional amount. The Court of Appeals said:

> "* * * But the plaintiff testified categorically that, in his opinion based on his experience as a specialist in suits in admiralty for personal injuries, the seaman's 'case was worth about $25,000.' Thus on plaintiff's own testimony the gross fee he could possibly receive under his retainer would be one third of that amount or $8,333.33, and, of course, his profit from the business would be substantially less.
>
> "Out of his own mouth the plaintiff satisfies us to a legal certainty that he did not have a claim for the

> amount necessary to confer federal jurisdiction and either knew or reasonably ought to have known that fact." * * * (Opinion of the Court of Appeals, First Circuit—Pet.'s App. pp. 25, 26)

The trial court determined that the petitioner's services were far less valuable. It concluded that the value of Vazquez's claim was $15,000 and that petitioner's services were worth but $2,750.00. The court allowed $95.00 for petitioner's disbursements—making a total of $2,845 (196, 197).*

Questions Presented.

1. Was the Court of Appeals correct when it concluded as a matter of law that there was no jurisdiction on the facts where petitioner conceded that his damages could not exceed the statutory limit, and where the trial court so found?

2. In the absence of a finding by the trial court that petitioner lacked good faith in claiming damages in excess of the statutory amount, could not the Court of Appeals make this finding where the evidence amply supported its conclusion?

3. Whether the judgment of the Court below conflicts with the decision of the Court of Appeals for the Fourth Circuit in *McDonald* v. *Patton,* 240 F. 2d 424 (1957)?

4. Whether an action for malicious interference with a contractual relationship between attorney and a seaman comes within the admiralty or maritime jurisdiction of the federal court and, therefore, does not require the amount in controversy to exceed $10,000?

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* References are to respondents' appendix in the Court of Appeals.

Counter Statement of the Facts.

Because petitioner's "Statement of the Case" refers to matters which are not borne out by the record references cited and because the "Statement" is incomplete, respondents find it necessary to make this counter statement.

Jose Vazquez, a Spanish national, was employed on a vessel flying the Panamanian flag. Following his injuries on December 6, 1958, he was hospitalized at Mercy Hospital, a private institution in Portland, Maine on the same day. On December 7 or 8, petitioner received a telephone call from one, Torres, who was then in Boston, informing petitioner about Vazquez (34). Petitioner did not know where Torres had obtained the information about Vazquez and did not know whether Torres was acquainted with Vazquez (36).

On December 9, 1958, Torres and a Mr. Malone, a Boston lawyer employed by petitioner, were dispatched by petitioner from Boston to Portland to procure a retainer. Mr. Malone took along a printed form of retainer (34) although, at the time, petitioner was not under any oral retainer by Vazquez (34). Petitioner did not know the circumstances under which the retainer was signed (36), nor could he say from personal knowledge that Vazquez understood the nature of the retainer and his legal rights.

Mr. Malone was not called by petitioner to testify. Torres was not produced on the trial because, as petitioner testified, he was dead.

Petitioner did not explain to Vazquez his rights under his contract with Panama (49). Petitioner does not speak Spanish and Vazquez did not understand English (19) so that petitioner never had any direct conversation with Vazquez (113).

Petitioner offered in evidence the deposition of Arthur W. Eggleston, an employee of Esso, in which Eggleston testified to the reasons which Vazquez gave for signing petitioner's retainer. Vazquez told Eggleston that men from Boston told Vazquez that he had been abandoned by his employer (Panama); that he would be a "cripple" for life; that Panama would send him back to Spain and "just dump him"; that "he would never ship again"; and that he would have no way to provide for his family (139). Vazquez signed the retainer but he did not understand it (139, 140).

Vazquez testified on a deposition but it was excluded by the trial court. However, one Esparza, a port steward of Esso (138) testified that he spoke Spanish and that Vazquez made similar statements to him (57, 58, 60).

When petitioner was examined before trial he refused to answer questions about how the retainer had been procured and it was necessary for respondents to obtain an order from the court compelling him to do so (107, 111).

On December 16, Heidtmann, a representative of Esso happened to be in Portland on other business and, in accordance with company practice, visited Vazquez in the hospital to see how Vazquez was getting along. Heidtmann found two men at Vazquez's bedside. One of these men said that he was Vazquez's lawyer but he did not identify himself further nor did he show a retainer (66). (This was the first notice to respondents that Vazquez had engaged a lawyer). Heidtmann reported this state of affairs to Eggleston (66). Heidtmann returned to the hospital later the same day with an interpreter but did not learn anything more from Vazquez (67, 68).

On December 18, Eggleston and Esparza attended at the hospital to ascertain if Vazquez had, in fact, hired a

lawyer and also to make certain that Vazquez was receiving appropriate medical attention and that his wants were being attended (69). At this meeting Vazquez confessed that he was wrong in engaging a lawyer (144). He was informed that if he wished he could discharge the lawyer.

On December 26, Gordon, another Esso representative, while on other business called on Vazquez to see how he was progressing and to ascertain whether Vazquez was in need of anything (51). At the same time Gordon offered Vazquez a letter written in Spanish which Vazquez could use if he wished to discharge his lawyer (53). Gordon speaks only a few words of Spanish and thus could not and did not hold a full discussion with Vazquez (51, 52).

In the early part of January 1959 at the suggestion of Torres, petitioner visited Vazquez (25). At this time Vazquez said he intended to continue with petitioner as his lawyer (41). No representatives of respondents called on Vazquez after December 26. On February 10, 1959, Vazquez notified Esso that he wished to see a representative. Accordingly, Heidtmann made a second call on Vazquez (68). At this time, the hospital chaplain, Father Romani, a Roman Catholic priest, was present. After a discussion between Vazquez and Father Romani, who spoke Spanish, the latter, at Vazquez's direction, prepared a letter in English discharging petitioner. Vazquez signed this letter and Heidtmann mailed it (68).

Prior to this request to see a representative of the respondents, Vazquez had received a letter from a personal friend in Spain (190), and on the basis of this letter decided that his interests were best protected by discontinuing his suit and returning to Spain (176, 177, 184). He consulted with Father Romani who agreed that this was Vazquez's best course (177, 178).

Consulmar, an independent company which supplies Spanish crews to steamship companies (130), also wrote to Vazquez. Esso had no control over Consulmar (167) but had written to Consulmar, reporting Vazquez's accident (153, 154). Consulmar had no connection with respondents except that it furnished Spanish crews to ships operated by Panama and other companies (130). The letter by Consulmar was not at the instance of respondents but in connection with the unique relationship which it has with Spanish crewmen (154, 161).

All of the respondents' witnesses denied having told Vazquez that it would take years to dispose of his case or that his lawyer would take all the money recovered or that Panama would take better care of him (Gordon, 52; Esparza, 61; Eggleston, 72).

On the other hand, petitioner did not produce any proof rebutting respondents' testimony that Vazquez did not understand the retainer agreement or that Vazquez had been induced to sign it because of Torres' misrepresentations as to respondents.

Reasons for Denying the Writ.

It is a well recognized principle that the certiorari jurisdiction of this Court is a power which is sparingly exercised, and then only in cases which are of grave and general importance. The history of the use of this power was clearly set forth in Justice Frankfurter's dissenting opinion in *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500, at pages 530-531, where he stated:

> "Thereafter such [FELA] cases could be reviewed by the Supreme Court only on certiorari to 'secure uniformity of decision' between the Circuit Courts

> of Appeals and 'to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. . . . These remarks, of course apply also to applications for certiorari to review judgments and decrees of the highest Courts of States'. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163-164. (See also *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257-258: Certiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.')"

This Court has frequently held that it will not grant certiorari to review evidence or discuss specific facts, *United States* v. *Johnston*, 268 U. S. 220, 227. See also *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178. Since petitioner's brief falls squarely within the above prohibitions, this petition should be denied.

POINT I.

THE COURT BELOW CORRECTLY HELD, IN ACCORDANCE WITH THE DECISIONS OF THIS COURT THAT PETITIONER HAD FAILED TO ESTABLISH THE NECESSARY JURISDICTIONAL AMOUNT TO MAINTAIN FEDERAL JURISDICTION. *McAllister* v. *United States*, 348 U. S. 19 HAS NO APPLICATION TO THE CONCLUSION OF LAW FOUND BY THE COURT BELOW THAT THE AMOUNT IN CONTROVERSY WAS INSUFFICIENT TO MAINTAIN FEDERAL JURISDICTION.

A.

This Court has established that the amount demanded in the complaint is not the sole criterion on which to judge whether federal jurisdiction exists in a diversity suit. The rule is that if facts are developed on the trial which show lack of monetary jurisdiction the Court may *sua sponte* dismiss for lack of jurisdiction. *St. Paul Indemnity Co.* v. *Red Cab Company*, 303 U. S. 283 where the Court said at page 290:

> "In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit. Indeed this is the court's duty under the Act of 1875."

Concededly petitioner's testimony on the trial showed that there was not the necessary monetary amount in controversy to satisfy the jurisdictional requirement. The trial court awarded petitioner only $2845 for fees and

disbursements. Petitioner was obviously satisfied with the award. He took no appeal although the amount awarded was less than 20% of the amount demanded in his complaint. Petitioner moved for re-argument in the court below but again did not complain that the amount awarded him was inadequate.

Indeed, in his brief in the court below, petitioner stated on page 11 "Plaintiff had evaluated Vazquez's claim as worth $25,000. The Court's estimate was only $15,000 and evidence on this issue justified this figure." Implicit in this argument is petitioner's concession that in no event could his damages exceed $5,000 and, therefore, no jurisdiction existed.

It follows that petitioner knew that the amount demanded was excessive and colorable to obtain jurisdiction. The award was based on petitioner's own testimony which did not establish the necessary jurisdictional amount. The court below gave the petitioner the benefit of the doubt stating that on petitioner's own testimony his recovery could not exceed $8,333.33. This again is less than the necessary jurisdictional amount.

The next question is whether the petitioner's demand for $15,000 was intended as a means of securing the district court's jurisdiction or, for its intimidating effect on defendant. In either event, petitioner's good faith is placed in issue.

The district court made no specific finding as to petitioner's good faith. The Court of Appeals specifically found as follows: "Out of his own mouth the plaintiff satisfies us to a legal certainty that he did not have a claim for the amount necessary to confer federal jurisdiction and either knew or reasonably ought to have known that fact" (Pet. App. 26).

This conclusion of law by the Court of Appeals is not here challenged on this petition for a Writ of Certiorari. True petitioner confuses this conclusion of law with a finding of fact.

The trial court found as a fact that the *Vazquez* case had a value of $15,000. On the basis of a one third retainer, the most that could be recovered by petitioner was $5,000. However, as the trial court found, this fee could be recovered only if petitioner had completely handled the case to a conclusion. Accordingly, petitioner was not entitled to the full fee because his service terminated early in the litigation and it was not necessary for him to expend additional effort. He could devote his time to other clients. Accordingly, the court held that the fair value of his fee, including the value of past services and those which he might have earned in the future was $2,750. (196, 197)

It is apparent from the findings of the two courts below that the demand in the complaint for $15,000 damages was not in good faith as understood under the principles established by this Court. Really it was a colorable claim intended to obtain jurisdiction over the respondents in the federal court or an attempt to impress respondents. This is emphasized by the small amount of work which the petitioner did in behalf of Vazquez. Petitioner's testimony as to this work was:

> • • • "Q. Well, I would like to know what work you did do prior to your discharge? A. I secured a full history on the case, analyzed the case. I made arrangements to start a law suit, contacted a law firm in New York, had them institute the law suit, had the man examined by a specialist up in Portland" • • • (118).

Petitioner's good faith may be tested by the evasive way in which he testified on his deposition before trial. Some

of this testimony curiously enough is set forth in petitioner's brief in this Court (pp. 7-9). The significant part of this testimony follows:

> • • • "Q. In other words, you don't maintain that as of the time you were discharged that you had earned by professional services the sum of $15,000?
>
> Mr. Malone: Do you understand the question?
>
> The Witness: I really do not understand the question." • • •

This evasiveness was not due to any lack of understanding about the value of *Vazquez's* case nor petitioner's rights thereunder. It is quite evident that he knew what the value of the case was but was attempting to conceal it so as not to early expose the basic lack of federal jurisdiction of his claim.

The burden of petitioner's argument is that the district court and the Court of Appeals should have considered the *Vazquez* case to be worth $45,000 and on this assumption that petitioner's damages were sufficient to satisfy the jurisdictional limits. This question has never been raised before. As indicated above, petitioner not only did not appeal from the fact finding of the district court as to the value of *Vazquez's* case but urged the court below that this finding was correct. In support of this new contention, petitioner cites self-serving declarations made on examination before trial and ignores the testimony which he gave in open court voluntarily and without equivocation to his own counsel. Even the self-serving declaration is not a clear statement, based on his experience as a specialist in the admiralty field, that the *Vazquez* case was worth $45,000. The testimony quoted in petitioner's brief is neither clear-cut nor definite. All the petitioner said was that in order for him to recover the amount demanded in the complaint

he would have to make a recovery in the *Vazquez* case of $45,000. His testimony means nothing more. In any event, even if it could be said that the testimony was definite, petitioner repudiated it on the trial and there gave his opinion as an expert that the *Vazquez* case was worth but $25,000. The trial court did not accept even this estimate and found as a fact that it was worth but $15,000. The petitioner was satisfied with this.

Now he argues that his testimony on the trial did not vitiate the testimony given on his examination before trial. There is a substantial difference between $45,000 and $25,000 as the experienced and expert petitioner well knows. The very argument which the petitioner now makes that the trial testimony did not vitiate the earlier testimony clearly exposes petitioner's lack of good faith in the demand made in his complaint.

The court below recognized this absence of good faith and reversed the conclusion of law of the trial court that there was jurisdiction.

It is a well established rule that even an appellate court must notice the absence of the elements requisite to original jurisdiction. *Williams* v. *Nottawa*, 104 U. S. 209; *Robinson* v. *Anderson*, 121 U. S. 522. Even if the question of lack of jurisdiction is not raised by either of the parties, the appellate court is free to act *sua sponte* upon any disclosure, whether in the pleadings or the proofs, which satisfies the Court, in the exercise of a sound judicial discretion, that the plaintiff did not, in fact, have a claim for the jurisdictional amount. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 184; *Morris* v. *Gilmer*, 129 U. S. 315.

The importance of good faith as to allegations of jurisdictional amount, was noted by Judge Irving R. Kaufman

in *Brown* v. *Bodak,* 188 F. Supp. 532 (S. D. N. Y. 1960) at page 533:

> "The inquiry should be a careful one, in light of the clear Congressional policy, expressed at the time of the recent amendment raising the requisite jurisdictional amount requirements. It was the intention of Congress to remove from the federal courts claims insubstantial in character, which contributed to the mounting backlogs of these courts. See 1958 U. S. Code Congressional and Administrative News pp. 2594-95. If plaintiff could avoid the jurisdictional amount requirements merely by alleging damages in excess of the jurisdictional amount, the purpose of this amendment would be largely negated."

A plaintiff in a diversity suit always has the burden of proving jurisdiction. This is a continuing burden even in appellate courts. *McNutt* v. *General Motors Acceptance Corp., supra,* pp. 182-189; *KVOS* v. *Associated Press,* 299 U. S. 269. Petitioner's brief fails to support this burden.

B.

In arguing that the court below did not follow the rule in *McAllister* v. *United States,* 348 U. S. 19, petitioner, on page 11 of his brief, quotes as language of this Court words which will not be found in the *McAllister* opinion. It is assumed that this was unintentional. However, respondents call this mis-quotation to this Court's attention so that there will be no confusion.

McAllister, supra, does not stand for the proposition that a court of appeals which notes error in a legal conclusion made by the district court may not reverse the legal error. All that *McAllister* stands for is that when

a district court makes findings of fact which are not clearly erroneous, the Court of Appeals may not set aside the findings.

In the case at bar, the reversal was for an erroneous conclusion of law. Both the district court and the court below found that the amount recoverable by petitioner was far less than the necessary jurisdictional limit. The court below went on to say that petitioner, (an expert in the field of negligence litigation) "knew or reasonably ought to have known" that his damages were insufficient to confer federal jurisdiction.

Petitioner never asserted in the court below that the findings of fact by the district court or by the court below were clearly erroneous.

As pointed out above petitioner conceded in the court below that the evidence on the trial justified the court's findings that the *Vazquez* case was worth but $15,000. It follows that there was no departure from the *McAllister* rule by the court below.

POINT II.

PETITIONER FAILS TO SHOW ANY CONFLICT OF OPINIONS BETWEEN THE COURTS OF APPEALS FOR THE FIRST AND FOURTH CIRCUITS.

On page 11 of his brief, petitioner contends that the Fourth Circuit's opinion in *McDonald* v. *Patton,* 240 F. 2d 424 (CA 4th 1957) conflicts with the decision of the court below. The *McDonald* case itself demonstrates the fallacy of this contention.

McDonald was a suit for damages for the negligent destruction of plaintiff's automobile. Three elements of damages were alleged totaling: $3000, $67.90 and $14.00.

Defendant moved the district court on plaintiff's pleadings and before answer to dismiss for lack of jurisdiction on the ground that the latter two items were not recoverable. The Court of Appeals held that these two items of damages were recoverable and reversed the dismissal. All that the *McDonald* case stands for is where the complaint alleges recoverable damages in excess of the jurisdictional amount the court will maintain jurisdiction where there is no lack of good faith apparent in the pleadings. In the case at bar, lack of good faith in al. ging damages was clearly established on the trial.

For a case where after a trial, the court concluded that the jurisdictional demand was colorable see *Matthiesen* v. *NorthWestern Mutual Insurance Co.*, 286 F. 2d 775, (C. A. 5th 1961). There the plaintiff sued for $20,000 damages for personal injuries. The trial court determined that plaintiff's damages were far below the jurisdictional amount and therefore dismissed the action. On appeal the plaintiff argued that "* * * no one but the injured party can really know whether he honestly believes that he is entitled to a recovery to as much as $10,000" (P. 776). The Court of Appeals sustained the dismissal, cited *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, and said, page 777:

> "We think, however, that in determining what the Courts mean by 'good faith' we find the answer given by the Supreme Court in the St. Paul Mercury Indemnity Company case, *supra*. There on page 290 of 303 U. S., on page 590 of 58 S. Ct. of the opinion the Court said:
>
> 'If, from the proofs, the court is satisfied to a like certainty (i.e. legal certainty) that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.' "

POINT III.

PETITIONER'S CAUSE OF ACTION WAS BASED ON A TORT COMMITTED ASHORE WITHIN THE STATE OF MAINE WITH RESPECT TO A CONTRACT MADE IN THE STATE OF MAINE AND GOVERNED BY STATE LAW. THE CAUSE OF ACTION DOES NOT FALL WITHIN THE ADMIRALTY AND MARITIME JURISDICTION OF THE FEDERAL COURT.

In Point 3 of his brief, petitioner, conscious of a lack of merit in his other arguments, seeks certiorari on the ground that this Court should take cognizance of the suit as a maritime matter. Notably, no cases are cited for this proposition and the relevant cases cited by respondents in the court below are ignored.

This Court has held that a contract between an attorney and his client is governed by state law. *In Re Paschal*, 77 U. S. 483. The same rule was applied by this Court in *Dickinson, as Receiver of the Chicago, Rock Island & Pacific Railway Company* v. *Stiles*, 246 U. S. 631. In the latter case, a lawyer sought damages because of interference by the Railroad with his contract of retainer with a railroad employee under which the lawyer undertook to sue for damages under the Federal Employers' Liability Act. 46 USC 51. The Jones Act (46 USC 688) incorporates this statute. A seaman's contract with an attorney to sue a shipowner in his behalf for damages under the Jones Act is also governed by state law. *Bennett* v. *Sinclair Navigation Co.*, 33 F. Supp. 14 (D. C. E. D. Pa.).

In the case at bar, the mere fact that a seaman's contract was involved does not afford maritime jurisdiction. *Clinton* v. *West Coast Local No. 90*, etc., 161 F. Supp. 177 (D. C. ND CAL 1955). The alleged tort took place on

shore and not on navigable waters, thus, excluding the application of the statute giving jurisdiction in maritime matters (28 USC 1333).

In *The Plymouth,* 70 U. S. 20, a ship caught fire while at a dock and the fire was negligently permitted to spread to the dock where it caused damage to cargo. This Court held no admiralty jurisdiction and said at page 35:

> • • • "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters." • • •

It was held in *Crain* v. *American Waterways Corporation,* 143 F. Supp. 256, (DC ED Pa. 1956) that a slanderous statement made by a shipowner against a seaman is not a maritime tort if not made on navigable waters. Similarly, in *Forgione* v. *United States,* 202 F. 2d 249 (CA 3rd 1953) cert. den. 345 U. S. 966, false arrest and imprisonment ashore of crew members by the ship's master was held not to be a maritime tort.

The case at bar is even further away from maritime cognizance. Here the alleged tortious conduct related to a lawyer and had no relation to a ship, seaman, or navigable waters. *Great Lakes Transit Corporation* v. *Marceau,* 154 F. 2d 623 (C. A. 2d 1946).

CONCLUSION.

In the language of *Layne etc. Co.* v. *Western Well Works*, 261 U. S. 387, 393, a writ of certiorari should not be granted "* * * except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals." The case at bar has no public importance. There is no conflict among the circuits and the petition itself is wholly without merit. It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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